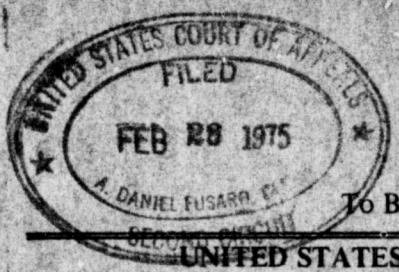
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE



74-2352

To Be Argued By: ROBERT M. ZISKIN

UNITED STATES COURT OF APPEALS

For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEES UNITED FEDERATION OF TEACHERS AND UNITED FEDERATION OF TEACHERS WELFARE FUND

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NO. 74-2352

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BRIEF OF APPELLEES UNITED FEDERATION OF TEACHERS ND UNITED FEDERATION OF TEACHERS WELFARE FUND

PRELIMINARY STATEMENT

This case is before the Court upon an appeal filed by plaintiffs-appellants, Women In City Government United, (WICGU) and fourteen employees allegedly on behalf of themselves and others similarly situated, from an order and judgment of the United States District Court for the Southern District of New York rendered by the Hon. Whitman Knapp, on October 10, 1974, dismissing the Appellants' complaint (App. at 313a).[1] The District Court's order is not reported.

1/ *References to the Joint Appendix for this appeal will be cited as "App. at ."*

COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Is the exclusion of pregnancy and related conditions from fringe benefit plan coverage proscribed discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* ("Title VII")?

2. Is it proscribed discrimination to provide a benefit or fail to provide a benefit to individuals who, because of physiology would be the only ones affected thereby?

3. What does invidious discrimination mean in context of Title VII as it relates to pregnancy and related conditions?

4. Does discrimination on grounds of sex (or gender) mean something different when the Fourteenth Amendment is involved than when Title VII comes into play?

5. Under Rule 8(a) of the Federal Rules of Civil Procedure, ("FRCP") must a plaintiff in a sex discrimination case based upon pregnancy plead that the acts complained of were intentional and purposeful deprivation of specific rights and if so, is the failure to so plead a fatal defect to the complaint?

6. Under Rule 8(a) of the FRCP, must a plaintiff in a Title VII action plead that she has filed charges against the defendants with the Equal Employment Opportunity Commission ("EEOC") and specifically allege the names of the defendants against whom such charges were filed?

7. Under Rule 8(a) of the FRCP, must a plaintiff in a Title VII action plead exhaustion of her remedies?

8. Under Rule 8(a) (1) of the FRCP must a plaintiff in a Title VII action plead the grounds upon which the court's jurisdiction depends by alleging the issuance of "right to sue" letters prior to the institution of said action?

9. Under Rule 8(a) of the FRCP must a plaintiff allege

demand for payment of disability benefits prior to institution of action under Title VII?

10. Under Rule 8(a) of the FRCP was the plaintiff WICGU required to plead that it had a cause of action in its own right under Title VII naming members as representative parties as required by Rule 23.2 of the FRCP?

11. Under Rule 8(a) of the FRCP must a plaintiff, seeking redress under Title VII, who wishes to maintain a class action, plead the facts of numerosity, commonality, representivity and typicality as prerequisites to there being jurisdiction?

12. Does the institution of an action under Title VII, prior to the issuance of "right to sue" letters render such action jurisdictionally defective?

13. Is a Welfare Fund which is not an employer, labor organization or employment agency a proper party defendant within the meaning of Title VII?

14. Does the plaintiff WICGU have capacity to sue and if it is not a protected person under Title VII may it nevertheless be representative of a class of litigants of which it is not a member?

15. Is the failure to make a timely motion under 11A(c) of the Rules of the District Court for a class determination under Rule 23(c)(1) of the FRCP, a defect precluding the maintenance of an action and the prosecuting of the instant appeal?

COUNTERSTATEMENT OF THE CASE

The Appellants commenced this action on January 17, 1974, against sixteen appellees including therein one city, two mayors, one city personnel director, two municipal corporations, one municipal authority, one board of education, two insurance carriers, three labor organizations representing public employees and three welfare funds affiliated with the three named labor organizations.

,The complaint herein filed by WICGU and fourteen employees alleges that the previously described appellees have violated Title VII, the Fourteenth Amendment to the United States Constitution and various provisions of State Law by providing fringe benefits which are less favorable to women than to men. Appellants allege in their first cause of action that the employers have discriminated against employees on the basis of sex in that health and hospitalization insurance plans provided by the employers offer substantially fewer benefits for pregnancy and pregnancy related conditions than for other medical and surgical problems requiring hospital and medical care (App. at 27a-33a). In the second cause of action, two insurance carriers are joined with the City and its related agencies as having aided and abetted the City in allegedly providing discriminatory health and hospitalization insurance (App. at 34a). In the third cause of action, the United Federation of Teachers (UFT), the Social Services Employees Union (SSEU) and District Council 37, American Federation of State, County and Municipal Employees (AFSCME) are joined as having allegedly negotiated discriminatory health and hospitalization fringe benefits with the defendant City (App. at 35a). In its fourth cause of action, it is alleged that the City, UFT and United Federation of Teachers Welfare Fund (UFT Welfare Fund) have established and administered programs which are discriminatory with respect to providing benefits for pregnancy and pregnancy related conditions (App. at 36a-37a). Causes of action fifth and sixth allege the establishment and administration by the SSEU and AFSCME respectively of welfare fund programs which are discriminatory with respect to providing benefits for pregnancy and pregnancy related conditions (App. at 37a-39a). Finally, in causes of action seven

through eleven, appellants challenge the policies of the City and its related agencies with respect to mandatory maternity leave regulations (App. at 39a-42a).

In particular, the Complaint alleges that the UFT and the UFT Welfare Fund violated the proscription against discrimination on the basis of sex contained in Title VII in that:

> ,"Defendants. . .have. . .discriminated against plaintiffs and the class because of sex, in that they have negotiated and approved health and hospitalization insurance fringe benefits which are discriminatory thereby causing plaintiffs and the class they represent damages. . ." [App. at 35a]

> "Defendants. . .have discriminated against plaintiffs. . .and other class numbers because of sex, in that the defendants have established and administered the defendant UFT Welfare Fund which offers no temporary disability benefits for disability resulting from pregnancy and pregnancy-related conditions, while temporary disability payments are provided for disability resulting from other medical and surgical conditions [App. at 36a]

The Answer [App.at 96a] submitted on behalf of the UFT and the UFT Welfare Fund denied the previously described allegations of the complaint.

On June 26, 1974, District Court Judge Knapp afforded the parties the opportunity to file briefs as to whether, in light of the Supreme Court decision in *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S.Ct. 2485 (1974), the Complaint should be dismissed by the Court, *sua sponte* (App.at 232a). On July 30, 1974, by opinion and order, the Hon. Whitman Knapp dismissed the Complaint with leave to replead and certified to this Court pursuant to 28 U.S.C.1292(b) "the question whether *Aiello* has established. . .that disparity between the treatment of pregnancy related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition of either Title VII or of the Fourteenth Amendment" (App.at 302a). Upon the Appellants election not

to replead facts alleging invidious discrimination, the complaint was dismissed in its entirety with prejudice. (App. at 313a-314a)

As of July 30, 1974, the date on which Judge Knapp issued his opinion and order dismissing the instant complaint, the instant litigation was in its most rudimentary stages. At said juncture, four of the sixteen appellees had not as yet filed answers, and three motions were pending seeking dismissal of the complaint. The discovery process was just starting up by virtue of the appellants serving of written interrogatories upon the defending unions and insurance carriers.

ARGUMENT

POINT I

THE EXCLUSION OF PREGNANCY AND RELATED CONDITIONS IN AND OF ITSELF IS NOT PROSCRIBED DISCRIMINATION UNDER TITLE VII OR THE FOURTEENTH AMENDMENT

(a) Discrimination between sexes can only result if one sex or the other receives greater or lesser benefits with respect to the same subject matter so that disparity of benefits with respect to their common subject matter results.
(b) A condition or state of being not common to both sexes cannot result in discrimination since the lack of commonality precludes disparity of treatment with respect thereto.
(c) The standard to be applied in discrimination cases is the same when applied to the Fourteenth Amendment or Title VII.
(d) Invidious discrimination means insipid, intentional and arbitrary differential treatment designed to favor one group over another with respect to the same thing and unless existent is not proscribed.
(e) In order to comply with FRCP 8(a) the complaint in a sex discrimination case under Title VII *must* allege facts constituting intentional invidious discrimination.

In its recent decision in *Geduldig* v. *Aiello*, *supra*, the Supreme Court squarely held that the exclusion of pregnancy and pregnancy related conditions from a state administered insurance program in and of itself does not constitute discrimination on the basis of sex. In this connection, the Court concluded that the Equal Protection Clause of the Fourteenth Amendment did not obligate the State of California to provide coverage for absences from work due to normal pregnancy under the state administered disability benefit plan. Having reviewed the California disability benefit plan with respect to its inclusions and exclusions of disability risks, the Court,

concluded that the state disability plan did not discriminate against any definable group or class, and noted "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.[2]

In *Aiello*, the dissenting justices urged, as do the appellants herein that:

> ". . .by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation. . . Such dissimilar treatment of men and women on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination."[3]

Replying directly to the aforesaid contentions of the dissenting justices, the Supreme Court concluded, in footnote 20 of its decision, which Judge Knapp found to be dispositive of the instant issue, as follows:

> ". . .this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71, and *Frontiero* v. *Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition – pregnancy – from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*.
>
> Normal pregnancy is an objectively identifiable physical condition with unique characteristics. *Absent a showing*

[2] 417 U.S. 484, 94 S.Ct. at 9492.

[3] 417 U.S. 484, 94 S.Ct. at 2494.

> *that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups – pregnant women and nonpregnant persons.* While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[4] Emphasis added.

By virtue of its decision in *Aiello*, the Supreme Court has unquestionably rejected the appellants' contention to the effect that ". . .classification on the basis of pregnancy, 'a natural and necessary female contribution'. . .is prima facie violative of Title VII. . ."[5]

In light of the *Aiello* decision, it is clear that the standard to be applied to cases involving exclusions from disability benefit coverage is the same when applied to causes of action brought under either the Fourteenth Amendment or Title VII. That standard simply stated is: does the particular exclusion constitute discrimination based on sex?

In the course of its consideration as to the propriety of establishing exclusions from a disability benefit plan, the Supreme Court held that the exclusion of pregnancy does not constitute sex discrimination –

[4] 417 U.S. 484, 94 S.Ct. at 2492, n.20

[5] Appellants' brief page 22.

> "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other. . ."[6]

Nowhere in the complaint nor in the brief on appeal did the appellants plead or contend that the UFT or the UFT Welfare Fund or any of the other appellees exclude pregnancy or pregnancy related conditions from disability coverage as a pretext designed to effect invidious discrimination against women. In any event such was not the case.

In the brief on appeal, the appellants urge that the *Aiello* decision is legally and factually distinguishable from the present action inasmuch as *Aiello* involved an attack on (a) the statute based solely on a claimed denial of equal protection; (b) on a legislatively enacted social welfare plan; and (c) a state temporary disability benefit program which excluded from coverage disabilities resulting from pregnancy. The appellants would further distinguish *Aiello* in view of the Supreme Court's finding that California had substantial, legislatively determined interests in limiting the coverage and benefits of the program to maintain the rate of California employees' contributions and the self-supporting nature of the plan.[7]

In his decision of July 30, 1974, Judge Knapp cogently put to rest the appellants' contentions in the following manner:

> " The flaw in this argument is that it begs the question. The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified – or less justifiable in the employment context than in some other context – can never be reached.

6 417 U.S. 484, 94 S. Ct. 2492 n.20.

7 *Appellants' brief – pages 9-11.*

> In other words, if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination 'because of. . .sex.' " 42 U.S.C. Sec. 2000 e(2)(a)(1).

Supporting Judge Knapp's conclusion that the same standards are applicable in a sex discrimination case arising under the Fourteenth Amendment and Title VII are such cases as *Chance* v. *Board of Examiners*, 458 F2d 1167, 1176 (2d Cir. 1972) and *U.S.* v. *Chesterfield County School District*, 484 F2d 70, 73 (4th Cir. 1973). In *Chance* v. *Board of Examiners, supra*, this Court recognized that it would be "anomalous at best" were public and private employers, in employment practice cases to be held to different standards under the Fourteenth Amendment and Title VII. Similarly, in another employment practice case, *U.S.* v. *Chesterfield County School District, supra*, the Fourth Circuit concluded:

> ". . .the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment."

It is significant in connection with the issue as to the appropriate standard to be applied in Fourteenth Amendment and Title VII cases, that the EEOC, in its amicus brief in *Aiello* stated:

> "The United States Equal Employment Opportunity Commission files this brief because it believes the standards the Court should apply in determining the constitutionality of §2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-*et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972).[8]

Regarding the appellants' "disproportionate impact" argument, it recognized that the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 applied a "disparate effect" standard in concluding that past overt racial discrimination was being perpetuated by means of the institution of non job-related qualifications. However, the appellants' contention that "a plaintiff makes out a *prima facie* case of discrimination by showing, as has been shown here, that the employer's policy disproportionately affects members of the protected class" is an oversimplification of the *Griggs* holding. In *Griggs*, *supra* at 431, the Court, having held that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"[9] merely prohibited the use of tests or other criteria which could not be shown to be related to job performance in view of the prior intentional racial discrimination. However, in *Aiello*, *supra*, the Court concluded that California's failure to cover absences due to normal pregnancy under a state administered disability benefit plan did not "discriminate against any definable group or class." Thus, an analysis of *Aiello* and *Griggs* reveals that the mere existence of a policy adversely affecting a specific group or class does not in and of itself establish discrimination. To the contrary, the *Griggs* holding was premised upon the perpetuation of prior intentional discrimination against a definable group or class. In

[8] *Amicus brief filed by the EEOC in Aiello v. Hansen, 359 F. Supp. 792 (N.D. Calif 1973) reversed sub nom. Geduldig v. Aiello, supra.*

[9] Appellants' brief – pages 12-17.

fact a close examination of the *Griggs* case tends to reveal that the Court recognized that the employer's institution of aptitude tests (which are neutral on their face) was in nature pretextual to mask and perpetuate said employer's previously followed policy of overt discrimination in hiring.

In such recent cases as *Espinoza* v. *Farah Manufacturing Co.* 414 U.S. 86 (1973) and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) the Supreme Court has continued to apply its *Aiello* pretext rationale. Thus in *Espinoza, supra*, the Court concluded that where there was a disproportionately high employment of *citizens* having the same national ancestry as the alien plaintiff, (Mexican) the refusal to employ Mexican *aliens* was not a pretext for discrimination on the basis of national origin. Similarly, *in McDonnell Douglas, supra*, at 431 another racial case which involved the refusal to rehire a black employee who had participated in unlawful civil rights activities, the Court, first holding that Title VII does allow a person's prior unlawful conduct to form the basis as a pretext for racial discrimination, declared –

> "... in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove."

Traditionally, FRCP 8(a) has been interpreted to merely require that a plaintiff's pleadings set forth a short, plain statement of the claim so as to provide the defendants fair notice of what the plaintiff's claim is and the ground upon which it rests. However, in the context of Title VII proceedings, mere notice pleading has been held to be insufficient. In *Valley* v. *Maule* 297 F.Supp.958 (D.Conn 1968) the Court citing *Powell* v. *Workmen's Compensation Bd. of State of New York*, 327 F2d 131, 137 (2d Cir.1964) and *Birnbaum* v. *Trussell*, 347 F2d 86, 89 (2d Cir. 1965) held:

> "As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the

> Civil Rights Act. The reason for this exception is clear. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State Courts. they all cause defendants... — considerable expense, vexation and perhaps unfounded notority."

In *Valley* v. *Maule, supra*. the Court dismissed the pending complaints on the theory said complaints were utterly devoid of any factual allegations alleging overt acts or a purposeful deprivation of rights.

Having concluded that footnote 20 of *Aiello* "plainly indicates a finding that disparity of treatment based on pregnancy does not in and of itself constitute such discrimination," Judge Knapp held that the appellants' complaint did not set forth a viable cause of action. Consequently, he concluded that the appellants should replead alleging invidious discrimination. As previously noted the appellants elected not to follow this suggestion. Not only is the instant complaint devoid of any allegation of invidious discrimination but no such assertion could realistically be interposed against the UFT or the UFT Welfare Fund.

In establishing and maintaining the UFT Welfare Fund program, its Board of Trustees have been concerned with providing welfare benefits to the extent that favorable claims experience, sound actuarial projections and finances permit.

The financing of the instant benefit program is fixed. The said programs are based upon a budget dependent upon reliable projections. advice and analysis submitted to the Welfare Fund by its consultants and actuaries. Thus, the maintenance of present levels of benefits as well as the improvement of existing benefits and the institution of any additional benefits is subject to the fixed contribution rate and actuarially supportable programs.

Therefore, in order to maintain the fiscal integrity of the Welfare Fund, the Board of Trustees thereof have promulgated

and caused to be maintained in force and effect a nondiscriminatory eligibility rule to be applied to all claimants. In view of the finite amount of monies available to it, the UFT Welfare Fund has endeavored to establish and maintain rationally supportable eligibility requirements.

POINT II

THE PLAINTIFF WICGU HAS NO CAPACITY TO SUE; IS NOT A PROTECTED PERSON UNDER TITLE VII; AND NOT BEING A PROTECTED PERSON MAY NOT BE REPRESENTATIVE OF A CLASS OF LITIGANTS OF WHICH IT IS NOT A MEMBER.

Point III A.4. of the Appellants' Complaint alleges that WICGU is nothing more than "an unincorporated employee organization composed of females employed by the City" (App.at 7a). However, there is no allegation to the effect that WICGU represents any individuals within a class of persons who are employed by the City and were capable of becoming pregnant or did become pregnant. Thus, it is ineligible to represent the alleged class. *National Welfare Rights Organization* v. *Wyman*, 304 F.Supp. 1346 (E.D.N.Y. 1969). Moreover, there is no contention that any of WICGU's members suffered any loss, injury, damage or discrimination at the hands of defendants UFT or UFT Welfare Fund. *Wilson* v. *Kelley* 294 F.Supp. 1005 (N.D. Ga. 1968), aff'd 393 U.S. 266 (1968). Thus, WICGU does not have the requisite standing to bring such an action under 42 U.S.C. 2000e-(f)(1) in its own right as it is not an aggrieved person within the meaning of the Civil Rights Act and therefore is not capable of being discriminated against. *Thomas* v. *Clarke*, 54 F.R.D. 245 (D.C. Minn., 1971); *Price* v. *Skolnick*, 54 F.R.D. 261 (D.C.N.Y., 1971); *Kaufman* v. *Dreyfus Fund, Inc.*, 434 F2d 727 (3rd Cir. 1970).

POINT III

THE COURT HAS NOT JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION UNDER TITLE VII WITH RESPECT TO PLAINTIFFS ARLENE FRIEDMAN AND ROBERT SUSSMAN SINCE THE JURISDICTIONAL PREREQUISITE OF THE ISSUANCE OF "RIGHT TO SUE" LETTERS PRIOR TO THE INSTITUTION OF THE ACTION HAD NOT BEEN MET.

As a prerequisite to the institution of a Civil action under the Civil Rights Act of 1964, Title 42, Section 2000e-5(f)(1) states, in part:

> "If a charge filed with the Commission. . . is dismissed by the Commission, or if. . . the Commission has not filed a civil action under this section. . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission. . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . ."

Neither plaintiff, Arlene Friedman nor Robert Sussman who have alleged causes of action against the UFT and the UFT Welfare Fund have asserted that either of them received right to sue letters from the EEOC as required above. Further, Sussman does not even allege having filed a charge with the EEOC.

As clearly enumerated in the foregoing cases a "right to sue" notice, issued pursuant to 42 U.S.C. 2000e-(f)(1), is a prerequisite to a Federal District Court acquiring jurisdiction in a Title VII, action, *Patterson* v. *Newspaper Mail Deliveries Union*, F.Supp. , 7 F.E.P. Cases 260, (S.D.N.Y., 1974); *Love* v. *Pullman*, 404 U.S. 522 (1972); *Johnson* v. *Seaboard Coast Line Railroad*, 404 F.2d 645 (4th Cir., 1968), cert. den. 394 U.S. 918; *Stebbins* v. *Continental Insurance Co.*, 442 F.2d 843 (D.C. Cir., 1971); *McDonald* v. *General Mills, Inc.*, F.Supp. , 7 F.E.P. Cases 66 (E.D. Cal., 1974); *Gilbert* v. *General Electric Co.* 59 F.R.D. 267 (E.D. Vir., 1973).

Similarly, the failure to *file* a charge with the EEOC will also defeat the jurisdiction of this Court in a Title VII action, *Richardson* v. *Miller*, 446 F.2d 1247 (3rd Cir., 1973); *Griffin* v.

Pacific Maritime Ass'n. 478 F.2d 1118 (9th Cir., 1973); Jerome v. *Viviano Food Co.*, F.Supp. , 7 F.E.P. Cases 143 (E.D. Mich., 1973) affd. 489 F.2d 965; *Perrino* v. *Southern Bell T.&T. Co.*, F.Supp. , 3 F.E.P. Cases 307 (S.D. Fla., 1970), aff'd. 440 F.2d 791.

Further, the Complaint gives no indication that those plaintiffs who did file charges with the EEOC *named* either the UFT or the UFT Welfare Fund in those charges. It is clearly a jurisdictional prerequisite to a suit under Title VII that a charge be filed against the party to be sued. *Bowe* v. *Colgate-Palmolive Co.*, 416 F2d 711, (7th Cir., 1969); *Richardson* v. *Miller*, 446 F.2d 1247 (3rd Cir., 1971); *Beverly* v. *Lone Star Lead Constr. Corp.*, 437 F.2d 1136 (5th Cir., 1971); *Tuma* v. *American Can Co.*, F.Supp. , 6 F.E.P. Cases 573, (D.C.N.J., 1973); *Edmonson* v. *Wackenhut Corp.*, F.Supp. , 2 F.E.P. Cases 39 (M.D. Fla., 1968).

It is respectfully submitted, that this Court lacks subject matter jurisdiction over the claims asserted under Title VII, Civil Rights Act of 1964 as against the UFT and the UFT Welfare Fund. Title VII has not been complied with by the Plaintiffs asserting Title VII claims against these two defendants.

Neither plaintiffs WICGU, Cantelmi, Friedman nor Sussman pleaded that they had ever demanded temporary disability payments from the UFT Welfare Fund.

The recent case of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) is instructive with respect to the necessity of this demand. *McDonnell Douglas* was a case involving a claim of racial discrimination under Title VII of the Civil Rights Act of 1964. The Court held that:

> "The complainant in a Title VII trial must carry the initial burden under the Statute of establishing a prima facie case of racial discrimination. This may be done by showing. . . that he applied and was qualified for a job for which the employer was seeking applicants; . . . that,

despite his qualifications, he was rejected. . . " (5 F.E.P. cases 970).

If the facts of demand and refusal are necessary elements of a Title VII discrimination case, they are necessary allegations of a Title VII complaint. See *McDonald* v. *General Mills, Inc.*, F.Supp. 7 F.E.P. Cases 66,70 (E.D. Cal., 1974), where the Court stated:

> I nonetheless feel constrained to point out that a recently decided Supreme Court case, cited by none of the parties, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), casts considerable doubt on the viability of plaintiff's claim as presently set forth in her complaint. In that case, involving alleged racially discriminatory employment practices, Justice Powell enunciated the elements of a prima facie case in a Title VII action as follows: 'The complainant in a Title VII trial must carry the initial burden under the statute (Civil Rights Act of 1964) of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that *he applied* and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.' 36 L.Ed.2d at 677, 5 FEP Cases at 969 (emphasis added). In the case at bar, plaintiff has *not alleged* in her complaint (1) that she ever applied or asked to be interviewed at the college placement office by the defendants, (2) that she ever applied for employment with the defendants, or (3) that any of the defendants has refused to hire her because of her sex or for any other reason. She *alleges only that she* sought to use the services of the Sacramento State College Graduate Placement Center and was 'deterred from making application for employment and seeking an interview' with representatives of the defendants. Without deciding, it appears that plaintiff has not established

> a prima facie case, in that she has *failed to allege* that she actually applied for either an interview or a job with any of the defendants. In the event plaintiff is able to overcome the jurisdictional defects in this case and decides to file a new action, the standards enunciated in McDonnell Douglas Corp. v. Green should be given careful consideration.
>
> IT IS ORDERED that this action be, and the same is hereby, dismissed for lack of subject matter jurisdiction." (Emphasis supplied.) (7F.E.P. cases 66,70).

That Court's reasoning is commended to this Court and the Court is respectfully urged to hold that this Complaint is defective with respect to the UFT and the UFT Welfare Fund for want of this necessary allegation.

POINT IV

A WELFARE FUND WHICH IS NOT AN EMPLOYER, LABOR ORGANIZATION OR EMPLOYMENT AGENCY IS NOT SUBJECT TO TITLE VII AND IS THEREFORE NOT A PROPER PARTY DEFENDANT IN AN ACTION THEREUNDER.

42 U.S.C. Section 2000e-5(f)(1), provides, in part, that:

> "If a charge filed pursuant to subsection (b) of this section is dismissed by the Commission, or if. . . the Commission has not filed a civil action under this section. . . the Commission. . . shall so notify the person aggrieved and. . . a civil action may be brought against the respondent named in the charge. . . "

Subsection (b), 42 U.S.C. 2000e-5(b), indicates that a charge is the instrument alleging an unlawful employment practice against an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs. It is quite clear that this foregoing list of entities, constitutes the exclusive list of organizations subject to Title VII of the Civil Rights Act of 1964. This is consistent with 42 U.S.C. 2000e-2 and 2000e-3 which sets forth the scope of unlawful employment practices, and only the foregoing list of entities is mentioned.

The UFT Welfare Fund is not in fact an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training, i.e. not one of the entities explicitly listed in the Act. Significantly, the appellants have not alleged the UFT Welfare Fund to be a covered entity within the meaning of Subsection (b) of 42 U.S.C. 2000e-5 (App.at 21a).

POINT V

The complaint is fatally defective because of non-compliance with FRCP 8(a) in that:

(a) WICGU failed to allege that it had a cause of action under Title VII in its own right; failed to name its members as representative parties required by FRCP Rule 23.2;

(b) Plaintiffs in action against UFT and UFT Welfare Fund failed to allege issuance of "right to sue" letters prior to institution of said action;

(c) Plaintiffs failed to plead facts supporting jurisdictional prerequisites necessary in class actions of (1) numerosity, (2) commonality, (3) representivity and (4) typicality;

(d) Plaintiffs failed to plead in actions against UFT and UFT Welfare Fund that they had filed charges against said defendants with EEOC naming them as such; nor exhaustion of their remedies under Title VII;

(e) Plaintiffs in action against UFT and UFT Welfare Fund failed to plead that demand had been made for payment of disability benefits prior to institution of action.

(f) Plaintiffs failed to make a timely motion under Rule 11A(c) of the Rules of the District Court for determination under FRCP Rule 23(c)(1) for a class determination, a defect precluding the maintenance of the action *and* prosecuting this appeal.

In Point II of this brief, it was contended as a matter of substantive law that WICGU and the individual plaintiffs alleging causes of action against the UFT and UFT Welfare Fund lacked capacity to sue; had no causes of action and were improper parties to maintain a class action.

In Point III, the matter of substantive law pertaining to the jurisdictional prerequisite of the issuance of "right to sue" letters *prior* to the institution of the action and the necessity of demand and refusal were established.

In Point IV, the matter of substantive law pertaining to a Welfare Fund *not* being subject to Title VII was reviewed.

With respect to these issues of substantive law:

A. WICGU was required to and failed to plead:

(1) the grounds upon which the Court's jurisdiction depends (FRCP Rule 8(a)(1); (Local Rule 11A)

(2) facts that the WICGU was entitled to relief in its own right and the issuance of right to sue letters (FRCP Rule 8(a)(2);

(3) that the class against the UFT and UFT Welfare Fund was proper because of (i) numerosity (ii) common question of law or fact (iii) claims are typical and (iv) the representative parties will fairly and adequately protect the class (FRCP Rule 23(a); Local Rule 11A (2);

(4) as an alleged unincorporated association the name(s) of certain of its members as representative parties (FRCP Rule 23.2) (Local Rule 11A (2)(i)(ii)(iii)(iv) and (v);

B. WICGU was required to and failed within sixty (60) days after filing the complaint to move for a class determination (FRCP Rule 23(c); (Local Rule 11A(c)).

C. The remainder of the plaintiffs alleging causes of action against the UFT and the UFT Welfare Fund namely, Friedman, Sussman and Cantelmi, were required to and failed to plead:

(1) the grounds upon which the Court's jurisdiction depends FRCP Rule 8(a)(1); (Local Rule 11A);

(2) facts that

(a) they had filed charges with the EEOC against the UFT and UFT Welfare Fund FRCP Rule 8(a)(1)(2);

(b) the exhaustion of their remedies under FRCP Rule 8(a)(2).

(c) that right to sue letters were issued to them prior to the institution of the action FRCP Rule 8(a)(1)(2);

(d) demand for payment prior to institution of the action and refusal FRCP Rule 8(a)(1)(2).

(3) that the alleged class of plaintiffs against the UFT and UFT Welfare Fund was proper because of (i) numerosity (ii) common questions of law or fact (iii) claims are typical and (iv) the representative parties will fairly and adequately protect the Class FRCP Rule 23(a); Local Rule 11A (2);

D. The said individual plaintiffs were required to and failed within sixty (60) days after filing the complaint to move for a class determination (FRCP Rule 23(c)); Local Rule 11A(c).

Females who may have been capable of becoming pregnant, but who did not become pregnant, can show no disability of any kind. This part of the alleged class can show no injury, damage or discrimination. A showing of injury and harm is necessary, *Wilson* v. *Kelley*, *supra*. In this connection, the Court should also consider the practical impossibility of determining who is or was capable of becoming pregnant. Moreover, the failure to plead demand and refusal, in this case, is an unforgiveable defect. *McDonnell Douglas Corp.* v. *Green*, *supra*; *McDonald* v. *General Mills, Inc.*, *supra*.

The provisions of Local Civil Rule 11A are clear. Rule 11A(c) required the plaintiffs to have moved this Court for a class determination within sixty (60) days after the filing of the pleading asserting a claim for a class, in this case, the Complaint. The Complaint herein was filed on January 17, 1974. The sixty days expired on March 18, 1974.

"The public business of the court. . . has been hampered and delayed. The purpose of Rule 11A(c) and (d) is to prevent the parties in a class action from impeding the course and progress of the litigation by failing to move for a class action determination." *Walker* v. *Columbia University*, F. Supp. 7 F.E.P. Cases 100,101 (S.D.N.Y., 1/21/74).

It is submitted that in order for a Court to authorize a class action the Court must be strictly convinced that the named plaintiffs will fairly and adequately represent the interests of the alleged class, as inadequate representation would seem to violate the "due process" rights of absent class members. *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Mersey* v. *First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y., 1968); *Feliciano* v. *Romney*, 363 F.Supp. 656 (S.D.N.Y., 1973).

The plaintiffs asserting claims against the UFT and the UFT Welfare Fund have committed such fatal procedural defects and engaged in omissions which have demonstrated their inability to fairly and adequately protect and represent absent class members.

CONCLUSION

For all of the foregoing reasons, the UFT and UFT Welfare Fund respectfully submit that the order of the District Court dated October 10, 1974 dismissing the Complaint with prejudice be affirmed in its entirety.

Respectfully submitted,

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February 24, 1975

ADDENDUM

Constitutional Provisions, Statutes, Rules and Regulations Involved

The FOURTEENTH AMENDMENT to the United States Constitution provides in relevant part:

"Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000(e) 2, *et seq.*, provides in relevant part:

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-3, provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(b) provides:

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and

promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(f) (1) provides:

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney

General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Rule 8(a) of the Federal Rules of Civil Procedure provides:

Rule 8. General Rules of Pleading
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 23 of the Federal Rules of Civil Procedure provides:

Rule 23. Class Actions
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class ation with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23.2 of the Federal Rules of Civil Procedure provides:

Rule 23.2. Actions Relating to Unincorporated Associations
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Rule 11A of the Rules of the United States District Court for the Southern District of New York provides:

Rule 11A. Class Actions
In any action sought to be maintained as a class action:

(a) The complaint shall bear next to its caption the designation "Complaint–Class Action." Comparable designations shall appear on any other pleading (counterclaim or cross claim) asserting a claim for or against a class.

(b) The complaint (or other pleading asserting a claim for or against a class) shall contain next after the jurisdictional grounds and under the separate heading "Class Action Allegations":

(1) A reference to the specific part or parts of Rule 23(b), Fed.R.Civ.P., under which it is claimed that the action is properly maintainable as a class action.

(2) Appropriate averments to justify such claim–including, but not necessarily limited to,

(i) the number (or approximate number) of members of the class,

(ii) a description of the members of the class,

(iii) the basis upon which it is claimed that the party asserting the claim will fairly and adequately protect the interests of the class, or, if the claim is asserted against a class, that the named members of the class will fairly and adequately protect the interests of that class,

(iv) the question of law or fact claimed to be common to the class, and

(v) in actions claimed to be maintainable as class actions under subdivision (b) (3) of Fed.R.Civ.P. 23, averments to support the findings required by that subdivision, including those noted under (A), (B), (C) and (D) of the subdivision.

(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed.R.Civ.P. 23(c) (1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge.

(d) If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party shall move, within thirty (30) days after expiration of the time allowed for such motion to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances.

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UFT—UFT Welfare Fund

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